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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 926

PITTSBURGH RAILWAYS COMPANY, a Pennsylvania corporation, Petitioner

v.

DUQUESNE LIGHT COMPANY, a Pennsylvania corporation, Respondent

PETITION OF PITTSBURGH RAILWAYS COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

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PETITION OF PITTSBURGH RAILWAYS COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Pittsburgh Railways Company, respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of Pennsylvania affirming an Order of the Court of Common Pleas of Allegheny County, Pennsylvania, requiring payment by Petitioner to Respondent of the sum of Ninety-five Thousand Eight Hundred Forty-two and 44/100 Dollars ($95,842.44), with interest, representing rentals adjudged to be due from Petitioner to Respondent on a lease between the parties.

The Question Presented for Review.

OPINIONS BELOW

The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, is reported at 111 Pittsburgh Legal Journal 165, and is included in the printed Record filed in the Supreme Court of Pennsylvania at pages 27a to 35a. The Opinion of the Supreme Court of Pennsylvania is reported at 413 Pa. 1, 194 A.2d. 319, and a copy thereof is appended hereto in Appendix page 28, infra.

JURISDICTION

(1) The judgment of the Supreme Court of Pennsylvania sought to be reviewed herein is dated and was entered of record on October 9, 1963.

(2) A petition for rehearing was filed within the prescribed period and was denied without opinion by the Court below on December 18, 1963.

(3) Jurisdiction to review the judgment of the Supreme Court of Pennsylvania by writ of certiorari is conferred upon this Court by the provisions of 28 U.S.C., section 1257 (3).

THE QUESTION PRESENTED FOR REVIEW

The sole question presented for review is whether or not the aforesaid decision of the Supreme Court of Pennsylvania denies to Petitioner the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America. The proposition is, of course, well established

that the action of state courts and of judicial officers in their official capacities is to be regarded as the action of the state within the meaning of the Fourteenth Amendment aforesaid *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, at page 842.

The burden of our argument in support of our petition for the issuance of a writ of certiorari can be briefly stated: The Supreme Court of Pennsylvania has in this case applied a statute of the Commonwealth of Pennsylvania in a manner diametrically opposed to its application of the same statute in its decision dated January 2, 1962. The petitioner is entitled to the same protection under the laws of the Commonwealth of Pennsylvania as was afforded the successful litigant in the aforementioned 1962 decision. The facts of the instant case and of the related case will be set forth hereinafter.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fourteenth Amendment to the Constitution, and especially that clause thereof which provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied)

The Petitioner is a corporation organized and existing under the laws of the Commonwealth of Pennsyl-

vania and is, therefore, a person within the Commonwealth of Pennsylvania.

(2) The statutory provisions involved are sections 3 and 11 of Article III of the Public Service Commission Act of Pennsylvania, more specifically identified as follows:

A. Article III, section 3 of the Pennsylvania Act of Assembly of July 26, 1913, P. L. 1374, at 1388, provides, inter alia, as follows:

> "Upon like approval of the commission (i.e., evidenced by its certificate of public convenience: Section 2 of the Act) first had and obtained, as aforesaid, and upon compliance with existing laws, *and not otherwise*, it shall be lawful—
>
> * * * * * * *
>
> "(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person." (Emphasis supplied)

B. Article III, Section 11 of the same Act at page 1395, provides, inter alia, as follows:

> "No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the commission. . . :"

STATEMENT OF THE CASE

The parties to this proceeding entered into a lease agreement dated June 5, 1933, whereby Respondent leased to Petitioner certain of Respondent's substations for use by Petitioner in supplying its streetcars with power. (3a; Exhibit A of Record) Although Petitioner did not discover the fact until completion of the adjudication in the Court of first instance, viz., the Court of Common Pleas of Allegheny County, this lease agreement was never approved by the Public Service Commission of Pennsylvania, as was required by the provisions of Section 3 of Article III of the Act of 1913, quoted supra, (7a, 8a), Respondent being then and since then a public service company.

Respondent instituted the proceeding by confessing judgment against Petitioner pursuant to a warrant of attorney in said lease agreement. (3a) Petitioner secured a rule to open the judgment and submit the controversy to arbitration. (6a) Arbitrators were appointed, and, after hearings, a majority, by their award, favored Respondent. (11a) The Court of first instance affirmed the award. (11a) In connection with preparing its appeal to the Pennsylvania Supreme Court, Petitioner discovered the absence of approval of the lease agreement by the appropriate Commission, as required by statute. (7a, 8a) Immediately, it petitioned the Court of first instance to open the judgment and permit petitioner to show these facts. The Court refused the petition, stating that the issues between the parties had been adjudicated and that the judgment would not be opened as prayed for by Petitioner. (27a et seq.)

On appeal, the Pennsylvania Supreme Court likewise held that the doctrine of res judicata was applicable and prevented the introduction of the proffered proof of statutory illegality. (Appendix 28 et seq.)

THE FEDERAL QUESTION OF VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This question was first raised in the Petitioner's petition to the Pennsylvania Supreme Court for reargument. See paragraph 12 of that petition at page 25 of Appendix. A litigant can not reasonably be expected to anticipate that the Court of last resort of a state will pay no attention whatever to its prior decisions and rule directly contrary thereto.

ARGUMENT

The merits of the controversy between the parties, viz., as to whether rentals were actually due on this lease agreement from Petitioner to Respondent are wholly irrelevant and immaterial herein. Suffice it to say that in the opinion of Petitioner, the judgment of the Court of first instance, affirmed by the Supreme Court of Pennsylvania, is highly inequitable and prejudicial to the Petitioner, as it resulted from a completely erroneous construction of the intention of the parties, arising out of a certain ambiguous term used in the lease agreement.

The single narrow issue raised by this petition is whether, consonant with the provisions of the Fourteenth Amendment preventing denial of equal protection of the laws, the Supreme Court of Pennsylvania erred in refusing to grant relief to Petitioner on the ground of the statutory illegality of this lease agreement, when it granted such relief by the application of an analogous

provision of the same statute in respect to a contract between a public utility and a municipal corporation.

The case in which the Pennsylvania Supreme Court held that the failure to comply with the statutory requirement of approval by the Public Service Commission rendered the contract illegal was *Carnegie Natural Gas Company v. County of Allegheny*, 406 Pa. 134, 176 A. 2nd 630 (January 2, 1962). The Gas Company in that case had easements for gas transmission lines under certain tracts of land in Allegheny County, which the County had acquired for the construction of an airport. In lieu of eminent domain proceedings by the County, the latter entered into an agreement in 1929 with the Gas Company, whereby the County agreed to reimburse the Gas Company for its costs in lowering its transmission lines so as not to interfere with the airport operations, and whereby, if in the future the Gas Company was required to install other lines to replace those rendered inaccessible, the County would reimburse the Gas Company for such costs.

The Gas Company relocated certain lines, and the County in 1930 paid the costs thereof to the amount of $35,815. Some 24 years later, as a result of leakage, the Gas Company was required to replace certain lines at a cost of $36,341. The County Controller refused to pay these costs on the ground that the original agreement had never been approved by the Public Service Commission. In 1956, the Gas Company applied to the Public Utility Commission, the successor Commission, for approval nunc pro tunc of the 1929 agreement. On February 9, 1959, the Commission entered an Order approving the agreement, but not nunc pro tunc. The

County appealed to the Superior Court of Pennsylvania, and the Superior Court, in an opinion at *Allegheny County, Appellant vs. Pennsylvania Public Utility Commission*, 192 Pa. Superior Ct. 100, 159 A2d. 227. (1960), held that the Commission's order of February 9, 1959, could have no retroactive effect, but it also held that the provisions of the statute with respect to approval by the Commission were directory and not mandatory, and that the County was bound by its obligation under the agreement. The County of Allegheny took no appeal from this decision of the Superior Court to the Supreme Court of Pennsylvania, and to all intents and purposes the Superior Court's decision constituted a final adjudication to the effect that approval by the Public Service Commission was *not* required.

Thereafter, the Gas Company instituted a suit in assumpsit in the Court of Common Pleas of Allegheny County to recover said sum of $36,341, the aforesaid cost of replacing part of its lines. The County again asserted that the agreement had no validity, since it had not been approved by the Public Service Commission as required by Section 11 of Article III of the Act of 1913, quoted supra at page 4. The Court of Common Pleas of Allegheny County, following the decision of the Pennsylvania Superior Court, held that approval was not mandatory and entered judgment against the County. The Supreme Court of Pennsylvania, in reversing the decision of the Common Pleas Court, held that the contract was unenforceable, because the statutory provisions for approval had not been complied with, saying at 406 Pa. 136-137:

> "The lower court, in permitting recovery by Carnegie, overlooked the clear pronouncements of this court that where a statute provides that a

contract entered into by a municipality should be executed in a particular manner, no liability is imposed upon that municipality unless the method prescribed by statute has been pursued. (citing cases) Statutory requirements for execution of such contracts are mandatory—not merely directory. Similar provisions in other statutes have been uniformly construed as mandatory. See *Yoder v, Luzerne Township School District,* 399 Pa. 425, 426-9, 160 A. 2d 419 (1960).

* * * * * * *

"We see no reason why failure to conform with the statutory requirements of approval by the commission should be excepted from the general rule that no contractual liability is incurred by the municipality unless statutory requirements are complied with. The legislature in the Act of 1913 required the commission to approve such contracts between municipalities and utilities. Such approval was not obtained, hence no recovery may be had by the utility for work done while the contract was unapproved. Proper though this contract might be, and as favorable as its terms are to the County, the County is without authority to pay in this instance. Subsequent approval of the contract by the commission in 1959 did not validate the contract so as to legalize the payment. The approval by the commission of the contract specifically was not made nunc pro tunc; hence, it is not necessary to decide whether the contract would have been revitalized by a nunc pro tunc approval."

The failure of the Supreme Court of Pennsylvania to apply the principles stated in the above case of *Carnegie*

Natural Gas Company v. Allegheny County to the instant case is an obvious discrimination against the Petitioner herein and denies to the Petitioner the equal protection of the laws required by the Fourteenth Amendment.

In effect, the Supreme Court of Pennsylvania, in the instant case, treated statutory illegality as a defense that is waived unless asserted in a timely fashion. It is true that Petitioner did not assert statutory illegality as a defense until a final judgment had been entered in the Court of first instance, but the explanation thereof was lack of knowledge of the fact of failure of the Public Service Commission to approve the lease agreement. As stated hereinabove, (page 5) Petitioner, immediately upon learning that fact, petitioned to open the judgment, asserting the invalidity of the lease agreement. Its petition was refused by the Court of first instance, and this refusal was affirmed by the Supreme Court.

The Supreme Court of Pennsylvania completely ignored two propositions which the Court has uniformly affirmed in many decisions, viz., (1) contracts that violate specific constitutional or statutory provisions are void and non-enforceable. See, in addition to *Carnegie Natural Gas Company v. County of Allegheny, supra, Waychoff et al. v. Waychoff,* 309 Pa. 300, 163 A. 670 (1932), *Dippel v. Brunozzi,* 365 Pa. 264, 74 A. 2d 112 (1950); (2) the defense of statutory illegality can be raised at any stage of the proceeding. In other words, no matter when it appears in a proceeding that a contract violates statutory requirements, the Court of its own motion should declare the contract void and non-enforceable. *Waychoff et al. v. Waychoff,* supra.

The statement of the Supreme Court of Pennsylvania that the doctrine of res judicata bars the assertion of the defense of statutory illegality is most surprising. Actually, of course, the matter of statutory illegality was never adjudicated either in the lower Court or in the Supreme Court of Pennsylvania. In the *Carnegie Natural Gas Company* case, supra, Mr. Justice Cohen, who wrote the opinion in the instant case, apparently had no difficulty in holding contrary to a decision of the Superior Court entered some time previous thereto, from which no appeal was taken to the Supreme Court of Pennsylvania, and which, therefore, constituted a final adjudication of the issues, between the County of Allegheny and Carnegie Natural Gas Company. Here, again, the Court, in applying the same law and reaching opposite conclusions is obviously discriminating in favor of a municipality and against a private utility corporation. Mr. Justice Cohen's apparent excuse for granting relief to a municipality appears in this excerpt from his opinion.

> "The engineering, accounting and legal staffs of utilities are specially trained in utility representation and thus, in many cases, have a decided advantage in contract negotiations with their counterparts in municipal government. For this reason, the legislature may have required the Commission, which also possesses expertize in all phases of utility matters, to approve such contracts, thus safeguarding the municipality by providing a method for preventing overreaching on the part of the utility."

The plain answer to that reasoning is that the legislature in the same Act likewise required approval of utility contracts with persons other than municipalities

in language similar to that used in the case of municipalities. It requires very little expertise in such matters to see that requirements of approval by the Public Service Commission are complied with.

CONCLUSION

The decision of the Supreme Court of Pennsylvania is in error by every applicable yardstick, established by the Court's prior decisions. Moreover, it constitutes a palpable discrimination against the Petitioner in the light of its decision in the *Carnegie Natural Gas Company* case, supra, in its diverse application of analogous provisions of the same statute. This, we submit, denies to Petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and warrants the granting of the writ of certiorari, as prayed for in this petition.

Respectfully submitted

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APPENDIX

APPENDIX

(178)

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DUQUESNE LIGHT COMPANY,
Appellee
v.
PITTSBURGH RAILWAYS COMPANY,
Appellant

No. 26 March Term, 1963
An Appeal from the Order of the Court of Common Pleas of Allegheny County of September 25, 1962, at D.S.B. No. 3536 January Term, 1959.

Petition for Reargument

To the Honorable, the Chief Justice and the Justices of the Above Court:

And now comes Pittsburgh Railways Company, appellant above named, and respectfully petitions this Honorable Court to grant a reargument in the above case because of the far-reaching effect of the Court's decision contravening sound legal principles and reversing an unbroken line of decisions of this Court and of other courts administering the common law, and in support thereof presents the following:

1. That on October 9, 1963 this Court handed down an Opinion affirming two Orders of the Court of Common Pleas of Allegheny County dismissing two petitions of appellant, one at the above number and term, in this

Court, and the other at No. 27 March Term, 1963, in this Court.

2. That this Petition for Reargument is limited to this Court's Opinion affirming at the above number and term the lower court's Order of September 25, 1962 by Judge J. Frank McKenna, dismissing appellant's said petition and denying appellant a rule to show cause why a certain Lease Agreement dated June 5, 1933 and involved in both Orders appealed to this Court, is unenforceable because of its *statutory illegality*.

3. That appellant respectfully submits that this Honorable Court's Decision and supporting Opinion are in contradiction of long-established and sound principles of law, as hereinafter outlined, and result in the enforcement of a contract declared by statute to be unlawful. This Honorable Court erred in holding, on page 4 thereof,

(a) that the defense of illegality as raised in the second petition of appellant was ineffective because of the determination of the Court of Common Pleas of the defenses raised in the first petition presented by appellant;

(b) that the defense of illegality as raised in the second petition might have been allowed only if the facts giving rise to the illegality appeared "on the face of the record"; and

(c) that it would appear that this Court, at the end of the paragraph on page 4, is holding that the doctrine of res adjudicata not only is applicable to the present petition but also would have full force and effect in any subsequent action brought on the said contract.

4. That appellant's combined Brief and Record at the above number and term filed with this Court in this appeal recites, beginning at page 2, the History of the Case, the entering against appellant of a D.S.B. Judgment by the appellee on December 31, 1958, under the provisions of said Lease Agreement executed June 5, 1933, a copy of which is attached to appellant's Petition to Open Judgment (12a-25a, inclusive); that both appellant and appellee, on June 5, 1933, for years both prior and subsequent thereto, admittedly were wholly owned subsidiaries of the Philadelphia Company, were public service and affiliated companies located at the same address, and had the same legal and other departments (Appellant's Brief, pages 5, 7 and 9).

5. That when the said contract of June 5, 1933 was entered into between appellant and appellee, admitted to be affiliated public service companies,

(a) Article III, Section 3 of the Act of July 26, 1913, P.L. 1374, 1375, for the protection of the public interest, provided that no such contract would be lawful without the prior approval of the Public Service Commission.

(b) Section 2 of the said Act provided that the approval of the Commission could be evidenced only by its Certificate of Public Convenience "first had and obtained, and not otherwise." (Appellant's Brief, page 13).

(c) The Legislature has repeatedly emphasized public policy and the need to protect the public interest in such contracts, as evidenced by the Act of June 3, 1933, P.L. 1526, 1535, effective two days prior to the execution of the Lease Agreement here

involved. This Act (Appellant's Brief, pages 14, 15 and 16) emphasizes the necessity of the Public Utility Commission being informed of such existing contracts between affiliated interests or any changes made therein. It is further provided that unless such contracts are filed as provided with the Public Service Commission, the contracts shall be ineffective.

(d) Section 706 of Article VIII of the Act of 1937, P.L. 1053, 1088 (66 P.S. §1276), creating the Public Utility Commission, reiterates and emphasizes the ineffectiveness of "every contract with an affiliated interest," which even if modified in violation of the Act or of any regulation or order of the Commission made under the Act "shall be void." (Appellant's Brief, page 22).

6. That appellant respectfully submits that this Court's Opinion, holding that the defense of illegality was lost and is res adjudicata because it should have been raised in the first Petition to Open Judgment presented by appellant, is contrary to a consistent line of decisions of this Court as well as courts in other jurisdictions, holding

(a) That contracts which violate specific constitutional or statutory law are void and unenforceable (Appellant's Brief, pages 29-35, inclusive). Particular reference is made to this Court' decision in *Waychoff et al. v. Waychoff*, 309 Pa. 300, 163 A. 670 (1932), page 31 of Appellant's Brief, where this Court clearly distinguishes between a contract which is against public policy, and therefore void, from a contract which is voidable. The same principle is stated emphatically by

this Court in the case of *Dippel v. Prunozzi*, 365 Pa. 264, 74 A. 2d 112, cited and quoted in Appellant's Brief at pages 31 and 32. There again this Court states clearly that a contract or an agreement which violates a statute or which cannot be performed without violating such a statute "is illegal and void," citing other Pennsylvania cases to the same effect. *Even when known to exist, failure to set forth illegality as a defense in prior litigation does not constitute res adjudicata.* In Section 684 of 30A American Jurisprudence, it is stated, page 433:

> "Where a defense is based on the principle of public interest, failure to interpose it in earlier litigation in which it might have been asserted does not render the judgment therein res adjudicata."

(b) That a contract which is void, and especially one which is in violation of a legislative or constitutional mandate, is unenforceable at any time. It has been held specifically by this Court and generally in other jurisdictions that no matter when it appears that such a contract violates public policy or statutory requirements, *courts even of their own motion* should declare the contract void and unenforceable.

In the case of *Waychoff et al. v. Waychoff*, 309 Pa. 300, cited supra, and also in Appellant's Brief, page 31, this Court said, at page 308 of its Opinion:

> "What, then, should the court below have done, and what should we do? Having before it a contract which was irremediably bad, because offending against public policy, the court below should have refused to proceed with a case based solely upon it, and should have dismissed the proceedings of its own motion. This is the duty of every court, whether

of first instance or appellate. In Chester School District's Audit, 301 Pa. 203, 213, we said: 'Where a public policy is or may be controlling, however, this court will, of its own motion, take cognizance of the matter, though it was not even suggested in the court below.'" * * *

The above pronouncement of this Court is not only sound but it is to be noted that this Court there said that even though illegality had not been suggested in the court below, nevertheless it was the duty of this Court of its own motion to take cognizance of the matter.

In this Court's Opinion in the instant case, Justice Cohen, with reference to res adjudicata, refers to the case of *Norristown Ford Co. v. Metropolitan Auto Dealer, Inc.*, 183 Pa. Superior Court 645, 132 A. 2d 725 (1957). It is submitted that the facts in that case involve a situation not comparable with our instant case, in that it did not involve public policy or public interest, nor the contravention of a statute enacted to, and creating an agency, to, protect the public interest. It simply involved a transaction between two private parties in a private transaction and, under the circumstances, there could have been no public interest or public harm. However, it is significant that this case referred to by this Court in its Opinion in the instant case recognizes that the question of an illegal and void contract can be raised at any time, whether in the court below or in the court above on appeal. Judge Hirt, in speaking for the Court in that case, stated (page 647):

"Pa. R.C.P. 1030 provides that certain defenses shall be pleaded in a responsive pleading under New Matter; and Pa. R.C.P. 1032 provides that subject to certain exceptions 'A party waives all defenses

and objections which he does not present either by preliminary objections, answer or reply. . .' We are unable to agree with appellee however that, since illegality was not pleaded in this case, the defendant is barred by the above rule from raising the question here. Goodrich-Amram in §1030-1.3 notes that illegality is an exception to the general rule that affirmative defenses must be pleaded, since the legality of the transaction goes to the very basis of the plaintiff's claim. Although not pleaded the question of illegality and its effect may be raised at the trial, as it was in this case, and also on appeal." * * *

(c) In view of the above, it is to be noted that in the instant case the illegality of the contract here involved was affirmatively called to the attention of the lower court by appellant's petition *before the appeal was taken to this Court* from the lower court's affirmance of the arbitrator's award under the first petition. As Chief Justice Bell, in his concurring Opinion correctly states, res adjudicata has no application to the allegations set forth in appellant's said petition. The above cases, including the *Norristown Ford Co.* case, cited by this Court, illustrate the sound rule that illegality involving the violation of a mandatory statute and therefore offending public policy, as set forth in appellant's petition in this case, is not a matter of res adjudicata or of the Court's discretion, and therefore can be raised at any time in any proceeding. The cases cited by Justice Cohen in this Court's Opinion, viz., *Jones v. Costlow* 354 Pa. 245, 253-54, 47 A. 2d 259, 263-64 (1946) and *Federal Land Bank of Baltimore v. Putman,* 350 Pa. 533, 538, 39 A. 2d 586, 588, *cert. denied,* 324 U. S. 882 (1944),

significantly are between private parties and do not involve violation of any statute or mandate, or public policy, and as in the former cases, it is agreed that the Court in those cases correctly states the law as to the application of res adjudicata.

7. That in further support of the above, in Sections 58, 59 and 61 of Chapter 3 of Standard Pennsylvania Practice, Volume 1, Revised, at pages 502-504, references are made to certain accepted and established maxims in the law. It is stated,

(a) In Section 58, that "no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal." It is pointed out that the rule with reference to the enforcement of an illegal contract goes no further than to deny an enforcement remedy. The fact that both parties were in violation makes no difference.

(b) In Section 59, that an illegal contract cannot be made enforceable by ratification, that permitting such ratification "would annul the rule and enable the parties by an easy expedient, to evade laws based upon considerations of public policy." This statement has significant application to contracts with or between public utilities which would involve the public interest in the rates charged the public by a utility. Even an attempted compromise of a claim based upon an illegal contract is not sufficient to permit the court to be used as the instrument for the enforcement of the compromise.

(c) In Section 61, under the heading of "Effect of Public Policy Demanding Relief," page 504,

"Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts,

and the rule is adopted not for the benefit of the parties, but for the benefit of the public."

Further in the said Section, at page 505, it is stated:

"In such cases (unlawful contracts) the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom the relief is granted being only the instrument by which the public is served."

8. That the Legislature, since the very inception of Public Utility Law, considered the necessity for public protection of such importance as *to impose severe penalties upon those who fail or neglect or refuse to carry out the provisions of the utility law.* (Appellant's Brief, pages 33, 34). Sections 35 and 36 of Article VI, P.L. 1374, 1430, and the said Act of June 3, 1933, effective, as hereinbefore stated, just two days prior to the date of execution of the lease agreement here involved, the Act of 1937 and also the prior Act of 1913, provide for penalties for failure to comply with their requirements. *The said Act of 1933 and Section 1306 of the Public Utility Law of 1937, as amended, makes it a misdemeanor by fine or imprisonment, or both, for an individual to affix his name to a contract or to be a party to an arrangement in violation of the Act.*

In *Employers' Liability Corp. Ltd. v. Fischer & Porter Company, Appellant*, 167 Pa. Superior Ct. 448, 75 A. 2d 8 (1950), the Court applied the recognized principle that the courts will not lend their aid to the enforcement of unlawful contracts, and especially to "one made in violation of a penal statute." The Court said, page 451:

". . . It is settled beyond question that the law will not aid one to recover on a contract expressly pro-

hibited by law. *Landy v. Phila. Life Ins. Co.*, 78 Pa. Superior Ct. 47. A party to an illegal bargain cannot recover damages for the breach thereof (Restatement, Contracts, §598) and a bargain is illegal if either the formation or performance of it are prohibited by statute. ibid. §580; 17 C.J.S., Contracts, §272. Courts will not lend their aid to the enforcement of unlawful contracts 'founded upon transactions in violation of a public policy declared by the legislature': *F. F. Bollinger Co. v. Widmann B. Corp.*, 339 Pa. 289, 14 A. 2d 81. The principle has application to 'an illegal contract, especially one made in violation of a penal statute': *Hazle Drug Co., Inc. v. Wilner et al.*, 284 Pa. 361, 131 A.286. Appellant argues that the Manufacturer's and Contractor's Liability Policy here in suit was illegal in that it violated two distinct provisons of The Insurance Company Law. We agree that the court erred in refusing to find as a matter of law under the present record that the insurance contract was illegal because in violation of at least one of the express statutory prohibitions of the Act."

Again reference is made to the penal statutes involved in the applicable Utility Laws.

9. That the Opinion of this Court in the instant case is completely irreconcilable with this Court's Opinion in the parallel case of *Carnegie Natural Gas Company v. County of Allegheny*, 406 Pa. 134, 176 A.2d 630 (1962), as well as with the same well recognized established principles of law hereinbefore referred to. *The Carnegie Natural Gas Company* case is discussed at length in Appellant's Brief, pages 23-28, inclusive. The

same principles of law, as a matter of fact the same analogies under the Public Service Commission Acts that appear in this Court's decision in that case, apply with equal force to our instant case. Nevertheless and despite the obvious inequities which appear in that case, this Court held that the failure of Carnegie to secure the approval of the Public Service Commission, as required by the Public Service Commission Act, deprived its agreement with the County of Allegheny of any validity and therefore, without such approval, the agreement was unenforceable. Moreover, this Court ignored the fact that the issue of illegality had been adjudicated against the County by the Superior Court of Pennsylvania in the case of *Allegheny County, Appellant v. Pennsylvania Public Utility Commission,* 192 Pa. Superior Ct. 100 (1960), from which the County took no appeal.

10. That in its opinion in this instant case, this Court states that appellant offered no explanation why the alleged violations of the Utility Law were not detected and set forth in appellant's original petition involved here. Aside from the fact that an unlawful and therefore void contract is unenforceable, regardless of when or however it so appears in litigation, nevertheless appellant has set forth in its said petition not only the circumstances surrounding the initial discovery (paragraph 12 of the Petition, pages 7a, 8a), but also has referred to and quoted from internal correspondence or communications in evidence in the companion case (Appellant's Brief, pages 10, 11, 12). It is submitted that these exhibits, stipulated for use in the instant case, naturally lead one to the assumption that what was stated by general counsel of the parent Philadelphia

Company and by others in the same legal department as to what would have to be done, surely must have been done. Furthermore, the lower court, in denying appellant a rule to show cause, also denied appellant the opportunity of introducing additional evidence and exhibits emphasizing the further basis for the same assumption, even though it is appellant's contention, from the cases hereinbefore cited, that such evidence with respect to the illegality here involved actually, under such circumstances, is not required.

11. That with respect to all of the foregoing, it is unquestioned that the averments of fact set forth in the appellant's said original petition, dismissed summarily by the court below, are to be taken as true, as though actually proved in the court below (Appellant's Brief, pages 8 and 9). Since the Legislature has provided unequivocally that the Public Service Commission originally, and the Public Utility Commission following, must initially approve such contracts, and evidence that approval by issuing a Certificate of Public Convenience before such contracts can become effective, therefore, in the face of appellant's averments of fact set forth in its said petition, which are not denied by appellee, the contract is unlawful and against public policy. In addition to what has been said hereinbefore, Mr. Justice Cohen, in the Opinion of this Court in the case of *Lansdale Borough, Appellant, v. Philadelphia Electric Company*, 403 Pa. 647, 170 A. 2d 575, correctly stated (page 651);

> "The Public Utility Law requires a certificate of public convenience to be obtained before any public utility can dissolve, abandon, surrender, in whole or in part, any service, or transfer by any method whatsoever any tangible or intangible

property used in the public service. Nevertheless, the Borough desires a court to initially determine whether the appellee must dissolve, abandon, sell, transfer or discontinue its already obtained franchise privilege to render service in this newly annexed area. Our courts do not possess the jurisdiction to make such a determination."

12. In view of this Court's decision in the case of *Carnegie Natural Gas Company v. County of Allegheny*, supra, construing the provisions of the Public Service Company Act precisely contrary to the Court's construction of the provisions of the same Act in the instant case, it is submitted that the decision in the instant case constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America. This constitutional provision applies to State Courts: *Shelley v. Kraemer*, 334 U. S. 1, 68 S.Ct. 836, 39 L. Ed. 469 (1948).

WHEREFORE, from the foregoing, and in order to maintain and preserve the important and sound principles of law so consistently recognized and applied by this Honorable Court, appellant respectfully prays that an order be issued granting a reargument of this case.

Respectfully submitted,

/s/ CLYDE A. ARMSTRONG
/s/ C. M. THORP, JR.
/s/ FRANK J. GAFFNEY
/s/ THORP, REED & ARMSTRONG
Attorneys for Pittsburgh Railways Company, Appellant

2900 Grant Building
Pittsburgh 19, Pennsylvania

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me, the undersigned authority, personally appeared C. D. PALMER, who being sworn according to law, deposes and says that he is President of the Petitioner; that he is duly authorized to make this affidavit in its behalf; and that the averments and the matters set forth in the foregoing Petition are true and correct, as affiant is informed and believes.

/s/ C. D. PALMER

Sworn to and subscribed before me this 21st day of October, 1963.

/s/ GLENN W. CONNELL
Notary Public
Pittsburgh, Allegheny Co.,

[SEAL]

My Commission Expires January 29, 1967.

Orders of Court

Following the filing with this Court of Appellant's Petition to strike Appellee's answer, filed after the lower court had dismissed Appellant's Petition to open and set aside the judgment, this Court made the following order:

> "October 19, 1962. Petition to strike answer from the Record denied; the case is remanded so that the Record may be completed.
>
> s/ J. C. BELL, JR."
>
> Referred to in Appellant's History of the Case, page 5.

Subsequently, appellee applied to this Court for leave to withdraw its said answer, whereupon this Court entered the following order:

> "November 8, 1962. Petition denied without prejudice to plaintiffs right to present a petition to the Court below.
>
> PER CURIAM"
>
> Referred to in the History of the Case and Appellant's Brief, page 6.

Whereupon, on November 16, 1962, the lower Court granted appellee's application to withdraw its answer to "Defendant's Second Petition to Open Judgment."

> This order is referred to in the Order of the Lower Court dated January 3, 1963, appearing in Appellant's Brief and Record filed in this case at page 35a.

Copy of this Court's Opinion affirming the lower Court, which incidentally includes the Court's Opinion at No. 27 March Term, 1963, is attached hereto.

(178)

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

DUQUESNE LIGHT COMPANY Appellee v. PITTSBURGH RAILWAYS COMPANY Appellant	Nos. 26, 27 March Term, 1963 Appeals from the Orders of the Court of Common Pleas of Allegheny County.

Opinion of the Court

Filed: October 9, 1963

COHEN, J.

No. 26 and No. 27 are appeals from the denial of two separate petitions to open judgment.

On June 5, 1933, appellant Pittsburgh Railways Company (Railways) and appellee Duquesne Light Company (Duquesne) entered into an agreement for the lease to Railways of certain substations and equipment necessary to convert electric power supplied by Duquesne. At that time, Railways and Duquesne were affiliated companies. The lease which was terminable upon 60-days' notice provided for an annual rent of $220,600.43.[1]

Pursuant to a warrant of attorney contained in the lease, Duquesne on December 31, 1958, confessed judg-

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1. The lease also contained a formula for determining the appropriate adjustment in rent where new property was included or old property discarded.

ment in the amount of $95,843.31, the rent due for the last nine months of 1958. Railways denied that this amount was owing and asserted, on the contrary, that it had overpaid rent in the sum of $414,530. Duquesne's claim and Railways' counterclaim were accordingly submitted to a board of three arbitrators as provided in the lease.

Before the arbitrators, Railways relied on the following clause of the lease:

> "The rental herein set forth includes a return to Duquesne for interest, *amortization,* insurance and maintenance except that insofar as the rental payments relate to land no return to Duquesne is made to cover amortization, insurance and maintenance. In making these computations the following percentages based on the costs of the property have been used with reference to the type of property indicated, namely, land 7% per year, buildings 9.7% per year, high tension switching equipment 11.5% per year, and utilization equipment 10.7% per year." (Emphasis supplied).

Railways argued that the purpose of this agreement between the affiliated companies was to have Duquesne finance the establishment of the conversion system; that Duquesne—as evidenced by the use of the term "amortization"—was to be reimbursed only for the cost of its investment and was not to receive a profit therefrom; and that since the amortization periods had expired,[2]

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2. Railways claimed that the amortization periods —and hence the rent due therefor—expired for high-tension switching equipment on December 31, 1948, for utilization equipment on December 31, 1953, and for buildings on December 31, 1958.

the rent should be reduced and Railways should recover its previous overpayments. Duquesne denied that this was the understanding of the parties and maintained that the stated annual rent was to continue until the lease was terminated.

The arbitrators, by a vote of two to one, agreed with Duquesne's interpretation of the lease and refused to open the judgment. On appeal to the Court of Common Pleas of Allegheny County this decision was affirmed on September 5, 1962. On September 25, 1962, Railways presented to the Common Pleas Court a second petition to open judgment this time asserting that the lease was void and unenforceable because of Duquesne's failure to file it with the Public Utility Commission and to secure approval thereof as provided in the Public Utility Act. The court below dismissed this petition on the ground that Railways could not now raise the defense of illegality. These appeals followed.

Turning first to appeal No. 27, the first petition to open judgment, we hold that the court below correctly affirmed the decision of the arbitrators.

On the matter of arbitration, the lease provides that all disputes shall be submitted to a board of three arbitrators and that the decision of any two arbitrators "shall be final and conclusive upon both parties as to all questions of fact involved in such arbitration." The present controversy resolves itself into a determination of whether the parties intended that Duquesne should make a profit from the lease agreement. On this question, there was conflicting oral testimony. In addition, each side presented corroborating evidence to support

its position.[3] In this state of the record, we conclude that the parties by the arbitration agreement intended the arbitrators' decision on the submitted question to be final. Hence we affirm this appeal without indicating how we would have decided the controversy in the absence of the arbitration agreement.

Turning next to the second petition to open judgment (No. 26), we hold that the court below properly dismissed this petition on the basis of res judicata.

It is hornbook law that the final determination by a court of competent jurisdiction settles not only the defenses actually raised, but also those which might have been raised. See *Jones v. Costlow*, 354 Pa. 245, 253-54, 47 A.2d 259, 263-64 (1946) and *Federal Lank Bank of Baltimore v. Putnam*, 350 Pa. 533, 538, 39 A2d 586, 588, *cert. denied*, 324 U.S. 882 (1944). The defense of illegality should have been raised in the first petition to open judgment. Although Railways' second petition alleges that it first discovered these facts while searching the records of the Public Utility Commission in the course

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3. Evidence corroborating the position of Duquesne included the fact that the lease contained a 60-day termination period without any obligation upon Railways to pay the unamortized balance upon termination; the fact that the lease contained no provision for a reduction in sales price by the amount already paid for amortization when rented machinery was sold to Railways; the fact that Railways continued to make payments for amortization after the applicable amortization periods had expired; and, perhaps the most persuasive, the unlikely possibility that skilled attorneys would attempt to accomplish the result claimed by Railways by merely referring to the term "amortization" instead of expressly stating that the rent should be reduced when the property had been completely amortized.

of preparing its appeal to this Court from the denial of the first petition, no explanation is offered why these alleged violations of the Public Utility Act were not detected and set forth in the first petition. The res judicata doctrine is designed to prevent the very situation which would result if appellant's second petition were granted, namely, the injection of a new issue into the case after almost four years of litigation.

Railways argues that an exception should be made to the application of the res judicata doctrine where the defense of illegality is involved. We neither know of such an exception nor make one here. It is true that a court may allow this defense to come into a proceeding where it has not arisen in the pleadings, so long as facts giving rise to the illegality of the transaction sued upon appear on the face of the record. See *e.g., Norristown Ford Co. v. Metropolitan Auto Dealer, Inc.*, 183 Pa. Superior Ct. 645, 132 A. 2d 725 (1957). This is not to say that the issue of illegality having been ignored in the pleadings or subsequent stages of an original proceeding may be raised in a subsequent action. The doctrine of res judicata has full force and effect under such circumstances.

Accordingly, the two orders dismissing the petitions to open judgments are affirmed.

Bell, C. J., files a concurring opinion.

Concurring Opinion

Filed: October 9, 1963

BELL, C. J.

I would affirm the Orders denying the petitions to open the judgments because there was no clear abuse of discretion or error of law. I believe that res adjudicata does not apply. See *Fogel Refrigerator Company v. Oteri*, 398 Pa. 82, 85-86.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 926

PITTSBURGH RAILWAYS COMPANY, a Pennsylvania corporation, Petitioner

v.

DUQUESNE LIGHT COMPANY, a Pennsylvania corporation, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DUQUESNE LIGHT COMPANY, a Pennsylvania corporation, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

For twenty-five years petitioner, Pittsburgh Railways Company, and its predecessor corporation of the same name paid respondent, Duquesne Light Company the rent reserved in the lease of June 5, 1933 (R. 52a).*

*R. with page numbers followed by the letter "a" designates the page in the printed record on the appeal to the Supreme Court of Pennsylvania at No. 27 March Term, 1963.

Beginning April 1, 1958, petitioner stopped paying (R. 41a), and on December 31, 1958 respondent entered judgment in the Court of Common Pleas of Allegheny County, Pennsylvania, for nine months rent under the warrant of attorney contained in the lease (R. 1a, 54a).

Petitioner's refusal to pay was based upon the assertion that because the periods for amortizing the leased properties on respondent's books (which had been orally discussed in the negotiations leading up to the execution of the lease but were not set forth in the written document) had expired, petitioner was no longer required to pay the component (also not set forth in the writing) of the rent intended to provide a return to Duquesne for amortization (R. 8b).* Later, petitioner also contended that it was entitled to a refund of $417,067 for overpayments (R. 37a-38a, 208a-225a, Ex. R-23,** 237a-239a, Ex. R-26).

Petitioner asserted that its contention gave rise to a dispute, and that it was entitled to have the dispute determined by arbitrators appointed pursuant to the arbitration clause of the lease (R. 3b, 9b). On petitioner's motion, and over respondent's objection, the Court of Common Pleas opened the judgment and directed the parties to submit the dispute to arbitration (R. 13b). This action was affirmed by the Supreme Court of Pennsylvania on June 30, 1960 (400 Pa. 565, 162 A.2d 350).

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*R. with page numbers followed by the letter "b" designates the page in the printed supplemental record on the appeal to the Supreme Court of Pennsylvania at No. 26 March Term, 1963.

**Ex. R- followed by a number designates a Railways exhibit so numbered in the printed record (Vol. II) on the appeal to the Supreme Court of Pennsylvania at No. 27 March Term, 1963.

After trial, the arbitrators on January 6, 1962 decided in favor of Duquesne (R. 416a-424a), and on September 5, 1962 their action was affirmed by the Court of Common Pleas (R. 459a-484a), which discharged the previously-granted rule and dismissed Railways' petition to open the judgment (R. 484a).

Three weeks later, on September 25th, Railways presented a second petition to open the judgment entered December 31, 1958 (R. 26: 1a, 3a-10a),* this time on the entirely new ground that the lease under which it had succeeded in having its defense and its claim for overpayments submitted to and heard by arbitrators was invalid and had never become effective in the first place, because of Duquesne's alleged failure to file it with the Pennsylvania Public Service Commission and its successor, the Pennsylvania Public Utility Commission, and because of Duquesne's failure to obtain a certificate of public convenience from either of those two bodies. On the same day, after argument, the Court of Common Pleas dismissed the petition (R. 26: 26a), refusing to grant a rule to show cause. An opinion in support of this action was filed December 3, 1962 (111 P.L.J. 165).

Railways appealed to the Supreme Court of Pennsylvania from the order of September 25th (appeal at No. 26 March Term, 1963) as well as from the order of September 5th (appeal at No. 27 March Term, 1963). After argument, the Supreme Court affirmed both orders in one opinion (413 Pa. 1). Railways then filed a petition for reargument (Appendix to Petition for Certiorari, pp. 13-26), which was refused. The present Petition for Certiorari followed.

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*R. 26 with page numbers followed by the letter "a" designates the page in the printed record on the appeal to the Supreme Court of Pennsylvania at No. 26 March Term, 1963.

ARGUMENT

I. Inconsistency of Application of a State Statute Raises No Federal Question.

Petitioner asks for certiorari under the Act of Congress of June 25, 1948 c.646 (62 Stat. 869) section 1257(3) (28 U.S.C. § 1257(3)), which authorizes the issuance of such writ "where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." The state statute which petitioner asserts is involved is article III, section 3 of the Pennsylvania Public Service Company Law of July 26, 1913 P.L. 1374, at page 1388. That statute was in effect when the lease was made, but has subsequently been repealed by the Pennsylvania Public Utility Law of May 28 P.L. 1053, section 1502 (1937 P.L. at p. 1118).

Petitioner has not brought itself within the statutory provision upon which it relies to obtain review of the decision below. Petitioner is not questioning the validity of the Pennsylvania statute. On the contrary, petitioner's contention is based on the assumption* that the statute is valid.

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*Petitioner overlooks the earlier decision of the Superior Court of Pennsylvania (the court to which appeals from the Public Utility Commission are taken) holding that such a statutory provision is unconstitutional if not restricted to property used or useful in the public service: *N. Pa. Power Co. v. Pa. P.U.C.*, 132 Pa. Superior Ct. 178, 200 Atl. 866 (1938), reversed on other grounds 333 Pa. 265, 5 A.2d 133 (1939). The record in the case at bar is bare of any allegation that the property subject to the lease was used or useful by respondent in rendering electric service to the public. On the contrary,

Argument.

Petitioner's contention is not that the statute is invalid, but that it is valid and that the court below erred in not applying it to strike down the lease between the parties. Petitioner asserts that the failure of the court below to apply article III, section 3 of the statute so as to invalidate the lease in suit was inconsistent with the same court's earlier application* of another, allegedly analogous, although differently-worded, section of the same statute (article III, section 11, at p. 1395) providing that no contract between any public service company and any municipal corporation should be valid unless approved by the Commission.

Even on the assumption that the two sections of the Public Service Company Law of 1913 were sufficiently alike to render the decision here sought to be reviewed in conflict with the earlier decision, such inconsistency does not deny petitioner the equal protection of the laws. Inconsistency of a state court in construing a state statute or in applying the common law of the state does not violate the federal constitution.

Beck v. Washington, 369 U. S. 541 (1962).

In the case cited, the Court in affirming the conviction of a criminal in a state court said with respect to the scope

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the second petition to open the judgment averred (¶3, R.26: 3a-4a) that the equipment was "used for converting electric power supplied by plaintiff [respondent] to the [leased] substations to voltages appropriate for use in operating streetcars of defendant [petitioner]." The operation of streetcars, or the conversion of power to voltages appropriate for use in such operation, was not asserted to be part of respondent's electric service to the public.

*In *Carnegie Nat. Gas Co. v. Allegheny Co.*, 406 Pa. 134, 176 A.2d 630 (1962).

of the fourteenth amendment as related to the decisions of state courts, speaking through Mr. Justice Clark (pp. 554-5):

> ". . . the petitioner's argument here comes down to a contention that Washington law was misapplied Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee,* 252 U.S. 100, 106 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.".

The above rule is but a specific application of the general and unquestioned principle that the overruling of a former decision does not violate the fourteenth amendment: *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 450 (1924). If in the present case the Supreme Court of Pennsylvania had overruled its prior, allegedly conflicting decision, petitioner would, under that principle, have no valid basis for complaint. For the same reasons, it can have none if the court below, instead of overruling its earlier holding, simply ignored it.

II. The Asserted Federal Question Was Not Raised Seasonably.

Petitioner correctly states (Petition for Certiorari, p. 6) that the asserted federal question was first raised in its Petition for Reargument in the Supreme Court of Pennsylvania. Petitioner seeks to excuse it tardiness with the argument that it could not reasonably have anticipated that the Supreme Court of Pennsylvania would rule contrary to its prior decisions.

It is hornbook law that, except in a few exceptional situations, a federal question first raised on petition for rehearing comes too late.

> *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

In that case the Court in dismissing a petition for certiorari based on a federal ground raised for the first time in the petition for reargument in the state court, said through Mr. Justice Brandeis (pp. 163-4):

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. *The contention that a federal right had been violated rests on the action of the trial court* in entering judgment without giving notice and an opportunity to be heard." (Emphasis supplied).

Conclusion.

The above statement of Mr. Justice Brandeis is precisely applicable to the case at bar. Any deprivation of petitioner's constitutional rights did not originate in the Supreme Court of Pennsylvania, which merely affirmed the order of the Court of Common Pleas. If any constitutional question exists in this litigation, it has been present ever since the judgment was first entered against petitioner in the Court of Common Pleas on December 31, 1958, or, at the latest, when that court refused petitioner's second petition to open that judgment on September 25, 1962. Petitioner had ample opportunity to raise any and all of its defenses, including those involving the federal constitution, in its original petition to set aside the judgment, filed January 8, 1959, in its amendment to that petition filed October 30, 1959, in its new petition to open the judgment filed September 25, 1962, and in its appeal from the trial court's dismissal of that petition. Petitioner's failure to take advantage of all these opportunities cannot be blamed on the Supreme Court of Pennsylvania.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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